Filed 2/24/15 In re S.M. CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re S.M., a Person Coming Under the Juvenile Court Law.	
SAN MATEO COUNTY HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. B.W., et al., Defendants and Appellants.	A142019, A142271 (San Mateo County Super. Ct. No. 77680)

S.M. (minor) is the child of appellants D.M. (Mother) and B.W. (Father). Following extended dependency proceedings, the juvenile court selected a permanent plan of legal guardianship, ordered monthly visits for the parents, and terminated dependency jurisdiction. Mother and Father argue the court erred by terminating dependency jurisdiction and delegating the terms of visitation to the legal guardian. We affirm.

I. BACKGROUND

The minor, then five years old, was the subject of a supplemental dependency petition under Welfare and Institutions Code[1] section 387, filed July 2, 2013. The petition alleged Mother, who had custody of the minor, had a history of erratic behavior

[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

due to mental illness and failed consistently to take medications prescribed to control her symptoms. At the time of the petition, Mother recently had been hospitalized after suffering a "psychotic manic episode."

The minor and her parents had a long history with child welfare authorities, beginning within weeks of her birth. A dependency petition based on Mother's mental illness was filed in 2007, but the minor was returned to Mother's care after a year, and Mother was granted full custody. A second petition was filed in 2010 when Mother's mental health again deteriorated. At the end of 2011, the juvenile court established a legal guardianship with the minor's paternal aunt, K. The guardianship was terminated in January 2013, and the minor was returned to Mother's custody. Throughout this period, Mother struggled to maintain her mental health, and Father repeatedly lapsed into and recovered from periods of substance abuse.

Following the filing of the supplemental petition in July 2013, the minor was returned to K. Around this time, Father was maintaining regular contact with the minor, and in August 2013 the San Mateo County Human Services Agency (Agency) was given the discretion to allow overnight visits with him. In contrast, Mother was not released from hospitalization until November 2013, and she continued to exhibit erratic behavior. Around the same time, however, Father relapsed and entered a drug treatment program. In December 2013, the juvenile court scheduled a permanency planning hearing pursuant to section 366.26.

In the reports prepared for the permanency planning hearing, the Agency noted the minor was doing well in K.'s care, but the "sporadic" visits of her parents had been "confusing for the child." K. declined to adopt the minor, but she was willing to become a legal guardian. Although the Agency considered the minor, then six years old, to be adoptable, it recommended a permanent plan of legal guardianship with K. because she had demonstrated "her commitment and ability to meet [the minor's] needs." In May 2014, Father filed a section 388 request for modification seeking reunification services and increased visitation.

At a combined hearing on Father's request and the permanent plan, Father and the minor's social worker testified. Father said he had been drug-free for six months. He was still in a treatment program and was attending a number of classes. In the months since his relapse, Father had seen the minor only twice, for one-hour visits, and K. did not always answer his telephone calls. Father purchased a cell phone and an iPad for the minor to make it easier for the minor to stay in touch with him, but K. forbade their use for this purpose. Father was concerned he would not be able to afford transportation to visits with the minor at K.'s home, once financial assistance from the Agency ended with termination of the dependency proceedings.

The social worker testified the minor was doing well in K.'s care and wanted to remain with her aunt, although she missed her parents and wanted to maintain contact with them. Father had to travel two hours by train to reach K.'s home, but he had been willing to do that, with the Agency's financial assistance. The social worker recommended once-a-month supervised visitation for Father outside K.'s home, assuming a guardianship was created, because of his history of substance abuse and recent threats he had made toward K. The social worker was skeptical of Father's claim he could not afford to visit the minor, noting he received a Veterans Administration pension and subsidized housing and had "a community of people who I'm sure would be more than happy to assist him with transportation." Recommended visitation for Mother was a once-a-month, out-of-home, supervised visit for no more than two hours.

The juvenile court denied Father's section 388 request, concluding reinstatement of reunification services was not in the minor's best interests because it was more important to provide the minor with "stability and permanence," which were available in K.'s home. With respect to the permanent plan, the court adopted the Agency's recommendations, appointed K. as legal guardian, and terminated dependency jurisdiction, while retaining jurisdiction over the legal guardianship.

During the hearing, the juvenile court recognized that the existing visitation order permitted one visit per month for each parent. In making its ruling, the court stated: "I am going to adopt the recommendations of the Agency, that was contained in their

addendum report to the .26 report, for—prepared for today's hearing date. [¶] I think it's time at this time to terminate the dependency, with the very more liberal visitation orders that I hope will provide enough flexibility so that dad can increase his visitation with [the minor] and also mom. [¶] So that the visitation orders will include the ability for the caregiver to delegate supervision to a responsible third party. Will also give her the discretion to increase visitation to both parents." The court directed Father and K. to attend a mediation session in an attempt to repair their relationship**,** and it noted the court retained jurisdiction over the matter in the event the parties believed more relaxed visitation orders would be appropriate. The court's written order noted K. had discretion to increase Father's visits and stated visitation with the parents "is to be as arranged by the parties & the guardian(s)."

II. DISCUSSION

Father contends the juvenile court erred in terminating dependency jurisdiction before letters of guardianship were issued to K. and abused its discretion in terminating the proceedings because "exceptional circumstances" justified retention of jurisdiction over the minor as a dependent. Mother also raises these issues and contends the juvenile court improperly delegated discretion to K. in determining Mother's visitation.[2]

A. *Termination of Dependency Jurisdiction*

If the juvenile court concludes a child will not be returned to the custody of his or her parents within the time period required by the dependency laws, the court must schedule a hearing to determine a permanent plan for the child's care. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249.) Among the options for a permanent plan is the appointment of a legal guardian. (*In re Carlos E.* (2005) 129 Cal.App.4th 1408, 1417.) If the juvenile court determines legal guardianship is the appropriate permanent plan, "it shall appoint the legal guardian and issue letters of guardianship." (§ 366.26, subd. (d).) A legal guardianship is not effective until the guardian has taken an oath to

[2] The separate appeals of Father and Mother were consolidated by order of August 12, 2014.

perform the duties of the office and the clerk of the court has issued letters of guardianship. (Prob. Code, §§ 2300, subd. (a), 2310, subd. (b).)

Once the court orders legal guardianship as a permanent plan, "the court shall retain jurisdiction over the child or nonminor dependent until the child or nonminor dependent is adopted or the legal guardianship is established . . . . Following establishment of a legal guardianship, the court may continue jurisdiction over the child as a dependent child of the juvenile court or may terminate its dependency jurisdiction and retain jurisdiction over the child as a ward of the legal guardianship, as authorized by Section 366.4. If, however, a relative of the child is appointed the legal guardian of the child and the child has been placed with the relative for at least six months, the court shall, except if the relative guardian objects, or upon a finding of exceptional circumstances, terminate its dependency jurisdiction and retain jurisdiction over the child as a ward of the guardianship, as authorized by Section 366.4." (§ 366.3, subd. (a).) "If dependency jurisdiction is terminated the court retains jurisdiction over the child as a ward of the court as authorized by section 366.4 [citation], but it no longer holds ongoing review hearings." (*In re K.D.* (2004) 124 Cal.App.4th 1013, 1019.) "In either situation, if a problem develops, the parent has access to the juvenile court." (*In re Kenneth S., Jr.* (2008) 169 Cal.App.4th 1353, 1358.)

1. *Premature Termination of Dependency Jurisdiction*

K. executed the oath and letters of guardianship on June 3, 2014, the day of the permanency planning hearing, but the letters were not executed by the court clerk until three weeks later, on June 26, 2014. The parents contend the juvenile court erred in terminating dependency jurisdiction prior to the issuance of the letters of guardianship.

We assume the parents are correct in arguing the juvenile court should not have terminated dependency jurisdiction until the guardianship was "established" by the issuance of the letters of guardianship (§ 366.3, subd. (a)), but the matter is now moot.[3]

[3] Error or not, it appears common for juvenile courts to terminate dependency jurisdiction prior to the formalization of the legal guardianship, if a willing legal guardian has been selected. (See, e.g., *In re Carlos E.*, *supra*, 129 Cal.App.4th at p. 1413 [court

Any error was cured by the issuance of the letters, and there is no longer any remedy that can, or need, be granted. The parents cite no practical harm as a result of the premature termination of dependency jurisdiction.

We find no merit in the parents' claim that the juvenile court's order is voidable because the court acted in excess of its jurisdiction. Section 366.3, subdivision (a) plainly grants the juvenile court the power to terminate dependency jurisdiction. That the court erred in doing so prematurely did not render its act in excess of its jurisdiction. (*In re Marriage of Goddard* (2004) 33 Cal.4th 49, 56 ["we observe that most procedural errors are not jurisdictional. [Citations.] Once a court has established its power to hear a case, it may make errors with respect to areas of procedure, pleading, evidence, and substantive law.].) Any premature termination of dependency jurisdiction led to no further judicial error or discernible harm to any of the participants, and the court retained jurisdiction over the minor under section 366.4 throughout. There is simply no reason to find this particular error reversible per se, the hallmark of an act in excess of jurisdiction. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 624.)

2. *Exceptional Circumstances*

Because K. is a relative of the minor, section 366.3 required the juvenile court to terminate dependency jurisdiction unless it found "exceptional circumstances." (*In re Grace C.* (2010) 190 Cal.App.4th 1470, 1476.) Father contends exceptional circumstances existed because he cannot afford to visit the minor without the financial assistance available through the Agency, which would no longer be available if dependency jurisdiction was terminated, and hostility between K. and Father made it unlikely visitation would occur without Agency supervision. Mother contends the Agency's involvement in visitation was necessary to ensure proper nurturing of her relationship with the minor. We review the juvenile court's decision for abuse of discretion. (*In re K.D.*, *supra*, 124 Cal.App.4th at p. 1018.)

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terminated dependency jurisdiction and directed issuance of letters]; *In re Dakota S.* (2000) 85 Cal.App.4th 494, 500 [same].) Because the issuance of the letters of guardianship is a ministerial procedure, this will rarely result in practical problems.

Assuming Father's inability to visit without financial assistance would constitute "exceptional circumstances" for continuing dependency jurisdiction,[4] we find no abuse of discretion because substantial evidence supports a finding Father's financial condition was not so dire. Father's claim was based entirely on his statement he could not visit the minor without financial assistance, which was presented in a conclusory manner without the submission of any other evidence about his financial circumstances. As the social worker testified, Father had a military pension and lived in subsidized housing. He was able to provide the minor with an iPad and a cell phone. In the absence of contrary specific evidence of Father's circumstances, this provides substantial evidence to support a finding Father had sufficient resources to afford a monthly trip by train and bus from San Francisco to K.'s home.

Substantial evidence also supported the court's conclusion continued Agency involvement was unnecessary to ensure proper visitation. There was no showing K. was inherently hostile toward visitation by either Mother or Father. The extent of Mother's visitation and the nurturing of her relationship with the minor will depend largely on her mental health and her willingness to comply with treatment, matters about which the Agency has little or no control. The court concluded the problems between K. and Father were largely of Father's own making, and it ordered the two to attend mediation to attempt to work out their differences. Again, Father's conduct is largely outside the control of the Agency. We find no abuse of discretion in the juvenile court's conclusion

[4] The statute does not define "exceptional circumstances." Because a primary difference between dependency and guardianship jurisdiction is the extent of oversight, it is suggested in *In re K.D., supra*, 124 Cal.App.4th 1013, that exceptional circumstances exist where the circumstances of the parties create a heightened need for judicial oversight. (*Id.* at p. 1019.) There is no statutory basis, however, to restrict the term to this meaning.

that issues of visitation, should they arise, can be handled under its continuing section 366.4 jurisdiction.[5]

B. *Visitation*

Mother contends the juvenile court improperly delegated authority over visitation to the legal guardian and should have entered a more detailed visitation order. When the court selects guardianship as the permanent plan, it "shall also make an order for visitation with the parents . . . unless the court finds by a preponderance of the evidence that the visitation would be detrimental to the physical or emotional well-being of the child." (§ 366.26, subd. (c)(4)(C).) The court has sole power to determine whether visitation will occur. (*In re M.R.* (2005) 132 Cal.App.4th 269, 274.) In general, "The time, place, and manner of visitation may be left to the legal guardian, but leaving the frequency and duration of visits within the legal guardian's discretion allows the guardian to decide whether visitation actually will occur. [Citation.] To hold otherwise would be to transfer this important decision to the possible whims of the legal guardian." (*In re Rebecca S.* (2010) 181 Cal.App.4th 1310, 1314; see similarly *In re Grace C.*, *supra*, 190 Cal.App.4th at p. 1478; *In re M.R.*, at p. 274.)

While the juvenile court's ruling never expressly states the required frequency and duration of visitation as to Mother, we conclude it can be reasonably interpreted to require supervised visits to occur at the recommended level of no less than once per month for no longer than two hours. The court's oral ruling implicitly anticipated that visitation would be continued at the existing level, which the court understood as once per month. Further, the court said that it was adopting the recommendations of the Agency. While the Agency's recommendation in the report prepared for the hearing, which was mentioned by the court, stated only that visitation "is to be arranged by the parties & the guardian(s)," the social worker testified at the hearing that the Agency's recommendation for Mother was once per month for no longer than two hours. Because

[5] Accepting Father's invitation to consider all these circumstances together, rather than as separate issues, we continue to find no abuse of discretion in the court's termination of dependency jurisdiction.

this testimony occurred immediately prior to the court's ruling, the ruling can fairly be interpreted to adopt that testimony as the recommendation of the Agency. As interpreted in this manner, the order was of sufficient specificity to ensure visitation was not left entirely to the discretion of K.

The parents have noted the lack of detail in the court's written order, which states visitation with the parents "is to be as arranged by the parties & the guardian(s)." While we recognize the ambiguity of this provision, it can be interpreted to mean the time, place, and manner of the visits is to be arranged by the parents and K., which would be consistent with the court's oral order. We therefore find no conflict between the orders.

The parents' argument does, however, point up a significant deficiency in the San Mateo Superior Court's standard check-the-box dependency order. Although visitation is a critical issue when legal guardianship is selected as a permanent plan, the superior court's standard order contains no provision for the court's designation of a plan of visitation. The only choice regarding visitation is the one noted above, which would be insufficient if selected without further explanation. At a minimum, to avoid misunderstanding and error, the superior court's standard order should be modified to permit the juvenile court properly to specify the frequency and duration of visits.

III. DISPOSITION

The juvenile court's order is affirmed.

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Margulies, J.

We concur:

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Humes, P.J.

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Banke, J.